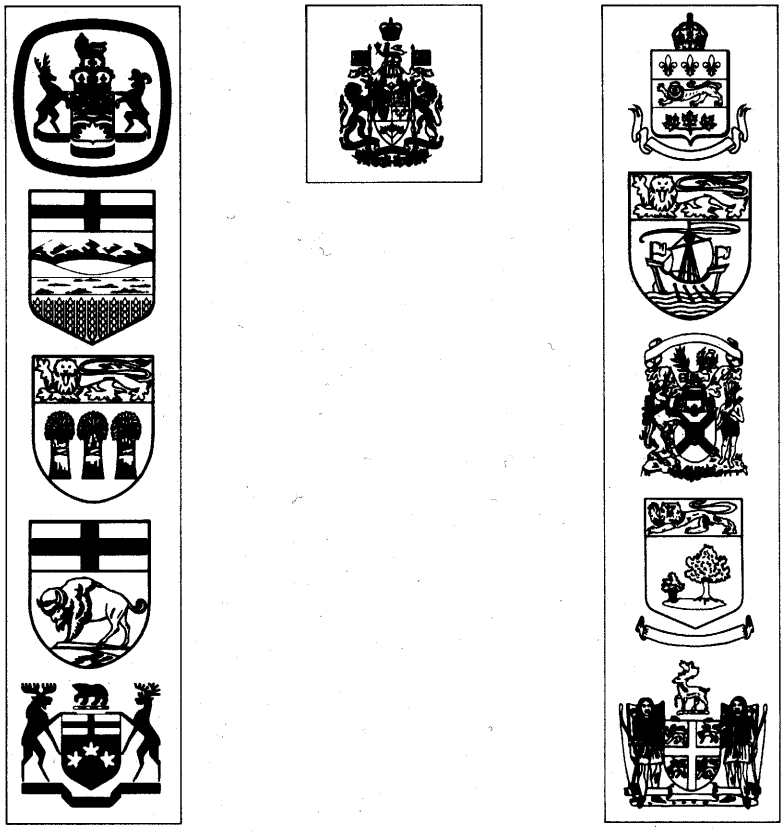
Harmony in Diversity:
A New Federalism for Canada

Alberta

GOVERNMENT OF ALBERTA



Harmony in Diversity:
A New Federalism for Canada

ALBERTA GOVERNMENT POSITION PAPER
ON
CONSTITUTIONAL CHANGE

OCTOBER 1978

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INTRODUCTION

Events of recent years — the growing sense of frustration felt by many Canadians in all provinces, the emergence of a new West and the election of a separatist government in Quebec — have created the need for a reassessment of the Canadian federal system. In legislatures across the country, in conferences and conventions, during proceedings of task forces and committees, the nature of a new federation has been debated and analyzed. This Position Paper is intended to contribute to this process.

The provincial governments of Canada, together with the federal government, will soon embark on a series of constitutional discussions which are intended to lead to the adoption of significant changes to the **British North America Act.** The Government of Alberta will participate fully in the discussions and will assess seriously all constructive proposals for change. Suggestions for constitutional change have been and will continue to be forthcoming from a variety of sources: from provincial governments, acting jointly and individually; from the federal government; and from various non-governmental committees and task forces. The many proposals must be given thorough consideration with a view to determining their value in promoting national unity and contributing to a more effective operation of our federal system in the future.

It is becoming increasingly evident that maintaining the status quo is not acceptable to the majority of Canadians. Following the 1977 Western Premiers' Conference, a communique was issued by the Premiers which stated:

> The Western Premiers reject both the "status quo" and Quebec independence followed by an economic association with Canada, the so called sovereignty association option, considering neither to be a viable alternative for solving the problems currently confronting the federal system.

In Quebec, the debate fluctuates between support for an independent Quebec and for a "rearranged" federal system. Canadians in other parts of Canada also have expressed dissatisfaction with the current operation of the federal system. It is vital, in the interests of all Canadians, to forge a new federalism and a new national consensus.

This Paper is one means by which the Alberta Government is addressing the challenge facing all Canadians. Recognizing that there are no easy solutions to Canada's problems, we invite the Members of the Legislative Assembly, Albertans and all Canadians to give careful consideration to these proposals. Several fundamental principles have been identified which have been and should continue to be the basis of our nation. In addition, specific proposals upon which a new federal system can be developed have been outlined. While the Paper examines a number of important constitutional questions which have risen to date, it by no means covers all of them.

I THE PRINCIPLES OF CANADA'S GOVERNMENTAL SYSTEM

In 1867, the Fathers of Confederation recognized that the union of the provinces into a nation called Canada could be achieved only through the development of a system of government which combines the principles of parliamentary government with those of federalism. This intent is clearly illustrated in the Preamble of the **British North America Act,** which states:

> Whereas the Provinces of Canada, Nova Scotia, and New Brunswick have expressed their Desire to be federally united into One Dominion under the Crown of the United Kingdom of Great Britain and Ireland, with a constitution similar to Principle to that of the United Kingdom . . . .

The maintenance of both a parliamentary system and a federal system of government remain prerequisites for the future of a united Canada.

In any new arrangement, several fundamental principles must be preserved and fully respected:

— responsible parliamentary government must be the basis of our system of government;
— the principles of constitutional monarchy must be maintained;
— all provinces have equal constitutional and legal status within Confederation;
— strong provinces make a strong, viable Canada, complementing the role of a strong federal government;
— within their respective spheres of jurisdiction, the two orders of government — federal and provincial — are equal, neither being subordinate to the other;
— each of the two orders of government must respect the responsibilities and jurisdictions of the other.

These are the major premises upon which Alberta will enter into the forthcoming constitutional discussions.

II THE PROCESS OF CONSTITUTIONAL REFORM

Recommendations:

The Alberta Government recommends:

1. **that the proposed changes to the Constitution be considered as a package, and not be compartmentalized;**
2. **that the process be undertaken with all deliberate speed, but that no unrealistic timetable be established; and**
3. **that no changes to the Constitution which affect federal-provincial relations or which affect the provinces be adopted without the concurrence of the eleven governments of Canada and of Parliament and the Provincial Legislatures.**

A constitution establishes the basic ground rules by which a country is governed. Constitutions do not and cannot operate by themselves. It takes people to make them work. Over time the basic framework or structure of government outlined in the constitution is transformed as the political system develops. The evolution of the Canadian Constitution is no exception to this general observation. The operation of the Constitution of today is vastly different from that of 1867. One should not be deluded into thinking that any revised constitution will not be subject to this process of evolution. Canada has undergone the transformation from primarily a rural and agricultural country to a diversified economy, and has weathered the storms caused by war and depression. New issues of public policy have emerged, such as social services, health care and the environment. As governments have dealt with these and other issues, new stresses and strains have been created within Confederation. To date, the federal system has managed to respond to these pressures. We must ensure that any changes to our Constitution do not hamper the evolutionary process as the political system meets future changes and needs.

Throughout our history, our constitutional framework has provided the flexibility necessary to accommodate change. On balance, the system has been highly stable, a condition which is vital to the preservation of society. The present method of amending certain sections of the **British North America Act** through a joint address of both houses of Parliament after securing the unanimous consent of provincial governments is an established practice and has become part of the constitutional fabric of Canada. In short, the existing Constitution has proven to be a remarkably resilient instrument, one which, if not venerated, deserves respect.

This is not to say that improvements to the **British North America Act** are not desirable or necessary, it is merely a recognition of its remarkable flexibility which has allowed Canada to meet the challenge of a changing world with confidence and vigour. It is thus imperative that any amendments to the **British North America Act** be adopted only after considerable thought and deliberation; we must be sure that any changes will significantly improve the system of government in Canada. Change simply for the sake of change has no place in the process of altering the provisions of the Constitution.

In light of the pivotal role of the Constitution within Canada, the process of constitutional change takes on considerable significance. In Alberta's view, this process cannot be divided into phases. The **British North America Act** was drafted as a comprehensive entity and a general revision requires study of and possible modification to the entire instrument.

If the process is to be a meaningful one, the overall impact of proposed constitutional changes must be considered. Furthermore, given the importance of any changes to the fundamental law of a nation, the participants cannot be constrained by an unrealistic time table. Finally, if this exercise is to be successful and credible, any changes must receive the unanimous support of the participants — the eleven governments of Canada — and must also receive the support of Parliament and the ten provincial legislatures.

III THE DIVISION OF POWERS

Recommendations:

The Alberta Government recommends:

4. **that modifications to the division of powers be recognized as the key to achieving a new federalism for Canada; and**
5. **that the division of powers be discussed concurrently with other constitutional questions, such as federal institutions.**

The division of powers is the critical element of a federal system of government. The particular division of powers in our federation must reflect the desire on the part of the people to have certain responsibilities entrusted to a federal government with others entrusted to provincial governments. The federal government should be endowed with sufficient powers to foster a national identity, ensure national security, and promote national economic well-being. Because the federation is predicated on diversity, the provinces must possess the powers necessary to meet their individual cultural, social and economic needs. Since the division of powers is so critical to the success or failure of a federation, each federation will approach the issue in its own unique way.

In Canada, the legislative powers listed in the constitution are contained in three categories:

— exclusive powers of Parliament;
— exclusive powers of the provincial Legislatures;
— concurrent powers.

Concurrent powers are those areas of jurisdiction for which both levels of government have responsibility. In the event of conflict between legislation of the two orders of government, a provision as to which government's legislation prevails, a paramountcy provision, is usually included.

The division of legislative powers is found primarily in sections 91-95 of the **British North America Act.** Section 91 sets out the exclusive powers of Parliament; Section 92, the exclusive powers of the provinces. Section 93 assigns to the provincial legislatures the exclusive right to make laws relating to education. Section 94A permits Parliament to make laws governing old age pensions and supplementary benefits; however, the provinces retain the right to enact laws in these areas. Finally, Section 95 provides for Parliament and the provincial legislatures to have concurrent powers of legislation in the areas of agriculture and immigration. In addition to the provincial legislative powers provided for in Sections 92, 93, 94A and 95, other proprietary interests of the provinces are outlined in Sections 109 and 117.

Section 109 provides for provincial ownership and control over all lands, mines, minerals and royalties. The revenue derived from these resources became an important means whereby provinces could fulfill in part their fiscal responsibilities. Thus, Section 109 is one of the fundamental cornerstones of Confederation. It was under the guidance of the provincial governments that the nation's natural resources were developed to the benefit of all Canadians.

Section 117 provides for the retention of provincial public property "not otherwise disposed of in the Act", subject to the right of Canada to assume lands for fortifications or for purposes of defence.

Although the division of powers in the **British North America Act** has served Canada well by providing a strong foundation for our federal system, a number of changes to the division of powers are required to meet the needs of Canadians today.

A. PROVINCIAL OWNERSHIP & CONTROL OVER NATURAL RESOURCES

i) Resource Ownership and Control

Recommendation:

The Alberta Government recommends:

6. **that the existing sections in the British North America Act protecting provincial ownership and control of natural resources be strengthened.**

When Section 109 of the **British North America Act** was drafted, it assigned to the original provinces ownership of and control over lands, mines, minerals and royalties. The **Natural Resources Transfer Agreement,** 1930, pursuant to the **British North America Act,** 1930, transferred ownership of resources from the federal government to Alberta, Saskatchewan and Manitoba, placing these provinces in the same position regarding natural resources ownership as the original provinces. For the provinces resource ownership and control has been an important and crucial factor in the development of their economies.

At the 1977 Annual Premiers' Conference in St. Andrew's, New Brunswick:

> "The premiers reaffirmed the primacy of provincial control over natural resources and stressed their fundamental importance to provincial economic development as a means of realizing the diverse regional, social and economic aspirations of Canadians. In this respect, the Premiers expressed frustration over certain recent federal activities that have thwarted, and thereby denied, provincial primacy over the ownership and management of natural resources. Examples of such federal moves include the non-deductibility of provincial royalties for federal income tax purposes, and direct involvement by the Government of Canada in litigation at the lower court level challenging the constitutional validity of provincial resource legislation under the guise of the trade and commerce power in the Constitution.
>
> The Premiers were of the view that provincial primacy over resource ownership and development called for a commitment by the Federal Government to harmonize its existing and future national policies in order to make them compatible with provincial natural resource development strategies.

At the Annual Premiers' Conference in Regina in August, 1978, the ten provinces unanimously agreed that one element of constitutional change must be "the confirmation and strengthening of provincial powers with respect to natural resources."

In particular, it should be clearly recognized that provincial jurisdiction over natural resources in 1867 was meant to be comprehensive. It was not intended that federal powers over trade and commerce be so interpreted as to render ineffective provincial jurisdiction and control over their natural resources. Recent Supreme Court of Canada decisions have created uncertainty as to provincial jurisdiction in this area. Consequently, Alberta believes that the original intention of the present Constitution must be reaffirmed and clarified.

ii) Resource Taxation

Recommendation:

7. **that the Constitution be clarified in order to re-affirm the provinces' authority to tax and to collect royalties from the sale and management of their natural resources.**

During their 1976 review of the Constitution, the ten Premiers unanimously agreed that "a strengthening of jurisdiction of provincial governments of taxation in the areas of primary production from lands, mines, minerals and forests" was essential. This sentiment had previously been expressed during the 1974 Annual Premiers' Conference in Toronto, when "the provincial leaders unanimously and strongly reaffirmed their responsibility for mining taxes and oil and gas royalties derived from provincial ownership of resources."

Recent decisions by the Supreme Court of Canada have caused uncertainty regarding provincial jurisdiction in the areas of taxation and royalties from the sale and management of their natural resources. Reaffirmation of provincial jurisdiction over resource control and management is essential.

iii) Offshore Mineral Resources

Recommendation:

The Alberta Government recommends:

8. **that provincial jurisdiction be established over offshore minerals.**

The Government of Alberta supports the position of some coastal provinces that provincial jurisdiction over ownership, control and management of natural resources be extended to off-shore minerals. In addition to being consistent with the provisions of Section 109 of the **British North America Act,** the implementation of this recommendation will assist in redressing economic imbalances within Confederation.

B. TAXING POWERS

Recommendation:

The Alberta Government recommends:

9. **that the provinces be given access both to direct and indirect taxes, with the exception of customs and import duties.**

One of the problems in a federal system is to ensure an appropriate balance between the fiscal needs and the fiscal capacities of the two orders of government. Under Section 91(3) of the **British North America Act**, the federal government may raise money "by any mode or system of taxation". Section 92(2) empowers the provincial governments to impose direct taxes within their boundaries "in order to the raising of a revenue for provincial purposes". Section 92(9) empowers the provinces to collect "shop, saloon, tavern, auctioneer, and other licences in order to the raising of a revenue for provincial, local or municipal purposes".

In recent years, it has become evident that it is difficult to distinguish clearly between "direct" and "indirect" taxes, and that the classical definitions of "direct" and "indirect" taxation, as evolved in the late 19th Century, are no longer appropriate. The development of the tax system over the past one hundred years has blurred the original distinction between direct and indirect taxes. Provinces have levied what they have believed to be direct taxes, only to find that the legitimacy of these taxes has been challenged before the courts. To avoid any further disputes, it is essential that the Constitution give authority to provincial governments to collect both direct and indirect taxes.

C. INTERNATIONAL RELATIONS

Recommendation:

The Alberta Government recommends:

10. **that the Constitution include provisions that confirm the established legitimate role of the provinces in certain areas of international relations.**

Section 132 of the **British North America Act**, which deals with treaties, is the only constitutional provision relating to the fulfillment of Canada's international obligations. The Section reads:

> 132. The Parliament and Government of Canada shall have all powers necessary or proper for performing the Obligations of Canada or of any Province thereof, as Part of the British Empire, towards foreign countries, arising under Treaties between the Empire and such Foreign Countries.

Canada's accession to full sovereignty in international affairs was established by the **Statute of Westminster**, 1931. Since there was no clear definition of the treaty power accompanying Canada's independent international status, the responsibility of defining the nature and characteristics of the treaty power was left to the judiciary, working without the benefit of a clear constitutional provision for the settling of jurisdictional questions relating to international relations.

The practices which have emerged over the past forty-five years may be summarized as follows:

- legislation is required for the implementation of all treaties;
- where the subject matter falls wholly within areas of provincial responsibility or jurisdiction, provincial legislation is necessary;
- where the subject matter falls partially within areas of provincial jurisdiction, federal and provincial legislation is necessary;
- where the subject matter falls wholly within areas of federal jurisdiction, federal legislation is required;
- the federal government may sign "umbrella agreements" with foreign powers which validate subsequent agreements signed directly between that foreign state and a provincial government.

While it is generally accepted that the development of foreign policy and the conduct of international relations is the responsibility of the federal government, it is also important to realize that the provinces have concerns in certain areas of international affairs. Provincial interests arise from a number of factors, including responsibilities in developing their economies, ownership of natural resources and transborder relations with the states of the United States.

At the 1977 Premiers' Conference in St. Andrews', New Brunswick, the Provinces unanimously stated that:

> While recognizing the primacy of the role of the federal government in international trade relations, the Premiers were of the opinion that the provinces also have legitimate interests and concerns in the international arena. Given these legitimate concerns and the large volume of Canadian trade with the United States, they agreed that it is entirely appropriate for the provinces to assume a more prominent role in Canada-U.S. relations. They noted that this increased role for provinces was supported by the recent Report of the Canadian Senate's Standing Committee on Foreign Affairs which stated that:
>
> > There needs to be . . . a new awareness at the federal level that a national foreign policy properly includes both federal and provincial activities, not merely federal matters. There needs to be more openness by federal departments and agencies regarding the overall direction of Canadian policy towards the U.S. and a greater degree of solicitation by Ottawa of provincial views.
>
> The importance of the U.S. market is such as to suggest that in addition to multilateral negotiations, Canada has also much to gain from bilateral trade negotiations with the United States. This will require close co-operation and liaison between both the federal and provincial governments, since it is only through such joint efforts that provincial, as well as federal, needs and priorities can be adequately reflected.

Recently, there has been recognition by the federal government that there is a federal-provincial perspective on external affairs. A revised constitution should include provisions relating to international affairs and should recognize the need for provincial involvement in those areas of foreign affairs of concern to them.

D. COMMUNICATIONS

Recommendation:

The Alberta Government recommends:

11. **that communications be included as a concurrent power in the Constitution.**

In 1867, communications services available to Canadians were limited to the post and to the telegraph. The postal service and interprovincial and international telegraph services were assigned to the federal government under Sections 91(5) and 92(10)(a) of the **British North America Act**.

The rapid expansion of the communications industry since that time has necessitated an assessment of this area of jurisdiction between the federal and provincial governments. That the provinces have legitimate interests in the field of communications, particularly in the area of cable television, has been recognized by the federal government. The federal Minister of Communications has indicated a willingness to pursue the possibility of arriving at an acceptable formula for the delegation of administrative responsibility in the area of cable television. What is required is a constitutional recognition of the provincial interests in communications.

E. FISHERIES

Recommendation:

The Alberta Government recommends:

12. **that sea coast and inland fisheries be a concurrent power in the Constitution, with provincial paramountcy.**

One of the most important renewable resource industries found in Atlantic Canada and in British Columbia is fisheries. The importance of this industry to the economies of the Province of British Columbia and to the provinces of Atlantic Canada requires constitutional recognition of the need for greater provincial control over this resource.

F. TRANSPORTATION

Recommendation:

The Alberta Government recommends:

13. **that provincial jurisdiction over certain aspects of transportation be strengthened by including transportation as a concurrent power.**

As the four western provinces noted at the Western Economic Opportunities Conference in Calgary in July, 1973, transportation policy is a major issue of immense importance to the provinces. In a country as large and geographically diverse as Canada, it is an essential tool for regional economic development. However, in the Western and Atlantic Provinces, inequities in rail rates, pricing policies, and the availability of competitive services and facilities have long provided an obstacle to economic development and diversification. Therefore, Alberta believes that, to ensure balanced regional development in Canada, an expanded provincial involvement in transportation is necessary.

G. CULTURE

Recommendation:

The Alberta Government recommends:

14. **that culture be included in the Constitution as a concurrent power, with provincial paramountcy.**

The encouragement of cultural pursuits is an important part of the development of any society. The expression of our unique culture through the arts, literature and the preservation of our diverse heritage is a vital part of our society's fabric.

Our federation is predicated on diversity; nowhere is this fact more clearly evident than in the area of culture. It is vital that our cultural diversity be recognized in the Constitution.

IV. A CONSTITUTIONAL COURT FOR CANADA

Recommendation:

The Alberta Government recommends:

15. **that a representative constitutional court be established to resolve constitutional issues.**

One of the most important functions of the courts in a federation is the interpretation of the constitution. Currently in Canada, the Supreme Court, in addition to being the final court of appeal, is also the final arbiter of constitutional issues or questions. Since interpretation of the constitution may have an impact upon the division of constitutional responsibilities and jurisdiction assigned to the federal and provincial governments, it is important that the court which interprets constitutional provisions be clearly seen to reflect the federal nature of the country. It must be cognizant of not only the views of the federal government but also of the provincial governments.

It is the view of the Government of Alberta that the function of arbiter of constitutional issues would best be carried out through a special constitutional court which is completely separate from the Supreme Court of Canada and which is representative of all parts of the country. Such a constitutional court could be set up in a number of ways. Alberta proposes that one such way would be to appoint a constitutional court from a previously agreed upon panel of experienced superior court judges, who reside in communities across the country.

The constitutional court panel could consist of approximately forty to fifty members. The panel members would be selected on a basis which reflects the population distribution among the ten provinces. Each provincial government would submit a list of judges to the federal government exceeding the number of panel members to be selected from that province. The federal government would then select the judges for the constitutional panel from among the list of names proposed by a provincial government. As such, federal participation in the appointment process is provided for when Ottawa initially appoints judges to the superior courts of the provinces, and in the final selection of panel members from among those nominated by provincial governments. Provincial participation is provided for in the nomination of judges for consideration by the federal government.

Such a system of checks and balances would assure a high degree of co-operation between the provincial and federal governments in the appointment of a constitutional court for Canada. If, in the event that under a revised constitution, provincial governments participate in the selection of justices of provincial superior courts, provincial participation in the selection of members of the constitutional panel would in no way be reduced.

A constitutional court consisting of seven members selected at random from amongst all members of the panel would be convened to hear questions or cases of a constitutional nature. Having heard the case, those seven members would not be eligible to hear another case until all other members have participated in a constitutional case. In the event that a member selected for a consitutional court had ruled on that particular case in a lower court, he or she would be ineligible to review the constitutional question.

Reference cases on constitutional questions from either the federal government or provincial governments would automatically be sent to the constitutional court for its consideration. Any party or intervenor in an appeal case before the Supreme Court of Canada involving a constitutional matter may apply to that Court for an order referring the case to the constitutional court. If the Supreme Court finds that there is indeed a constitutional element, it would refer the case to the constitutional court. The constitutional court would meet to decide on the constitutional question, and, upon the completion of this task, the case would be returned to the Supreme Court for rulings on other questions of law.

V. REGULATORY BOARDS AND AGENCIES

Recommendation:

The Alberta Government recommends:

16. **that forty percent of the members of designated national boards and agencies be appointed by the provinces.**

The federal government has established a number of boards, commissions and agencies to regulate various critical sectors of the economy. Each of these bodies has been created for a particular purpose and has been given a different range of powers and responsibilities. These bodies have been created in order to remove these regulatory functions from the day-to-day control of the federal government. The composition, size and powers of each board, the tenure and removal of members, the relationship to the Minister and to Parliament vary according to the circumstances and the degree of independence and accountability that Parliament decides is appropriate.

It cannot be denied that decisions made by the Canadian Transport Commission, the National Energy Board, the Canadian Radio and Television Commission, and the Canadian Wheat Board have extremely important consequences for provincial governments. In view of the profound effect the decisions made by these bodies have on provincial policies and priorities, particularly by those boards and agencies which deal with matters affecting key economic sectors in the provinces, provision should be made for provincial input into the membership of these bodies.

Alberta would recommend that forty percent of the members of designated boards be appointed by the provinces. The representatives appointed by provincial governments would be completely independent and would reflect provincial perspectives. They would not be delegates. Provincial input into these federal regulatory bodies would provide important benefits to the nation by bringing the different perspectives to bear on their deliberations. The Conference of Premiers would be requested to work out a system of appointments to these boards. This process would ensure that the perspectives of the ten provincial governments are taken into account.

VI CONSTITUTIONAL PROVISIONS AFFECTING THE EQUAL STATUS OF THE FEDERAL AND PROVINCIAL GOVERNMENTS WITHIN THEIR RESPECTIVE SPHERES OF JURISDICTION

The **British North America Act** contains certain provisions which affect the very nature of our federal system. Some of these provisions have outgrown their usefulness; others must be modified in order to assure that the essential principles of federalism are protected.

A. THE POWERS OF DISALLOWANCE AND RESERVATION

Recommendation:

The Alberta Government recommends:

17. **that the powers of reservation and disallowance be repealed.**

Disallowance — Under the terms of the **British North America Act**, the Governor General in Council may disallow provincial legislation by an order-in-council within one year of receipt of the provincial legislation by the federal government. While the power of disallowance has fallen into disuse, the clause remains in the constitution.

Reservation — Under the terms of the **British North America Act**, the Lieutenant-Governor of a province may "reserve" a provincial bill for the consideration of the Governor General in Council. The Governor General in Council may refuse consent to the bill, thus preventing it from becoming law.

The members of provincial legislatures, as elected representatives, should not be subjected to these quasi-colonial provisions.

B. THE DECLARATORY POWER

Recommendation:

The Alberta Government recommends:

18. **that the power of the federal government to declare a work situated within a province's borders to be for the general advantage of Canada or for two or more of the provinces should be used only after the concurrence of the province in which the work is situated.**

Section 92(10) of the **British North America Act** assigns to the provinces exclusive powers over "local works and undertakings, other than such as are of the following classes:

a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;

b) Lines of Steam Ships between the Province and any British or Foreign Country;

c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces."

The federal declaratory power is found in Section 92(10)(c) of the **British North America Act**.

The power of the federal government to declare a work for the general advantage of Canada or for the advantage of two or more of the provinces may be used by the federal government to assume control over major industries in any province or over certain natural resources. For example, the federal government exercised the declaratory power to bring uranium under the jurisdiction of the federal government. The Courts declared in 1925 that "Parliament is the sole judge of the advisability of making a declaration as a matter of policy" and that "the policy or the reason for the

declaration is a matter for the consideration of Parliament alone''. The determination of whether such a move is in ''the national interest'' is left up to Parliament.

In a general way, the use of this power may have a significant negative impact on a province's ability to determine economic priorities. To prevent any erosion of provincial jurisdiction, Parliament's use of this power to declare a work situated within a province's borders to be for the general advantage of the nation should be used only after the concurrence of that province.

C. THE EMERGENCY POWER

Recommendation:

The Alberta Government recommends:

19. **that the federal emergency power be limited so as to ensure that the federal government and Parliament cannot assume responsibility over a broad range of matters not listed within the enumerated heads of Section 91.**

Under Section 91 of the **British North America Act**, Parliament is empowered ''to make laws for the peace, order and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces''. This power is known as the ''General Power of Parliament''.

Through judicial interpretation of the Constitution, the ''peace, order and good government'' clause has been given two meanings. One of these areas of application is when an ''emergency'' requires the federal government to assume special powers. The other area of application refers to the residual powers.

In the event of an ''emergency'', the federal government assumes temporary powers. Traditionally, the ''emergency'' power became applicable in times of war. More recently, however, it was used to uphold the federal **Anti-Inflation Act**.

The emergency power should be limited to ensure that the federal government will not assume responsibility over a broad range of matters that are not within its constitutional jurisdiction as set out in the enumerated heads of Section 91 of the **British North America Act**. The possibility of this situation occurring is intensified where the emergency power has been given greater scope and where a doctrine of ''national interest'' may be substituted for ''emergency''.

D. SPENDING POWER

Recommendation:

The Alberta Government recommends:

20. **that limits be placed on Parliament's ability to spend in areas of provincial jurisdiction.**

The term ''spending power'' has developed a specific constitutional meaning in Canada. It is defined in a federal government paper entitled **Federal-Provincial Programs and the Spending Power of the Parliament of Canada, 1969**, as ''the power of Parliament to make payments to people or institutions or governments for purposes on which it (Parliament) does not necessarily have the power to legislate''. According to the federal paper, the Constitution as it has been interpreted by the courts, gives Parliament the power to spend on any object, providing that the legislation authorizing the expenditure does not amount to a regulatory scheme falling within provincial powers. The legal basis of this ''power'', it is argued, is found in Section 91(3) which provides that Parliament may raise money by ''any Mode or System of Taxation'', and by Section 91.1(A) which gives Parliament the right to make laws with respect to public debt and property.

The spending power of Parliament has been used to implement shared cost or conditional grant programs in those areas of provincial jurisdiction which Parliament considers to have a national

dimension. Programs for health and hospital insurance and post-secondary education are examples of the way in which the federal government has used its spending power. The provision of federal monies in areas of provincial jurisdiction or responsibility tends to distort provincial priorities and programs.

Moreover, federal funds for a major project in one year may not be continued in following years. The August-September, 1978 federal budget reductions are indicative of how these programs can be modified unilaterally. The withdrawal of funds by the federal government once a program is established may result in provincial governments having to ''fill the gap'', thus interfering with provincial budgetary planning. For these reasons, it is necessary that the power of Parliament to spend in areas of provincial jurisdiction be somehow controlled. While the implementation of Established Programs Financing in 1977 represents a significant step in this direction, constitutional limitations would provide a greater guarantee.

VII DELEGATION OF POWERS

Recommendations:

The Alberta Government recommends:

21. **that the concept of concurrent jurisdiction be expanded through a provision in the Constitution for the delegation of powers between the federal and provincial governments; and**
22. **that before a delegation of powers is effected, the federal government and the province(s) affected concur.**

While there must be an element of rigidity in a constitution to provide stability and continuity, it is necessary that a constitution be sufficiently flexible to provide for change. Greater flexibility than is currently provided for in the **British North America Act** may be achieved through a provision for the delegation of powers from one order of government to another.

Most of the federations established after the Second World War have included in their constitutions, provisions for the delegation of powers to enable the transfer of authority to meet a particular situation and to reduce the necessity for a duplication of administrative services. Care has been taken, in these constitutions, to preserve the equal status of both orders of government by requiring the consent of, or financial compensation to, the governments to which the power is delegated. The delegating government also retains the power to revoke such authority. Some constitutions provide for the delegation of powers in both directions; others provide for it only from one order of government to the other. In addition, some constitutions provide for the delegation of powers on an individual basis while others allow for it only with the consent of a certain percentage of the constituent units.

The Rowell-Sirois Report of 1940 recommended that a provision for delegation be added to the Canadian Constitution. During the constitutional discussions on the amending formula which took place in 1960-61 and in 1964, governments also addressed the question of the delegation of powers. They agreed that such a clause should be included in the Constitution. A delegation clause would give an element of flexibility to the Constitution. If a question of delegation arose, it would be up to each government to determine whether it wished to opt in or opt out. Consequently, the decision as to whether a particular responsibility should or should not be delegated would be at the discretion of each government.

VIII FEDERAL-PROVINCIAL CONSULTATION

Recommendation:

The Alberta Government recommends:

23. **that provision be made in the Constitution for an annual meeting of First Ministers.**

The growing importance of consultation and co-operation between the federal and provincial governments in policy and program development is due to the recognition of the potential impact that the policies and programs of one government may have on another. The increased interaction between the two orders of government is becoming so extensive that consultation must become more formalized as part of the process of policy-making in Canada. Federal-provincial consultation is part of the constitutional fabric of Canada, and should be so recognized. The developing practice of having "open" First Ministers' Conferences should be continued.

At the 1976 First Ministers' Conference, Premier Lougheed, on behalf of the Alberta Government, presented the following suggestions:

> We believe that a new phase in the development of federal-provincial relations is now necessary. The post-war era of federal-provincial relations has been described as the cooperative era of federal-provincial relations. A new direction for the federal system is essential if Canada is to meet the challenges of the future.
>
> It is increasingly necessary for governments to consider a common approach to national economic challenges. The discussion and development of shared-cost programs is only one aspect of national economic budgetary policies. At the same time, however, we believe that more discussion is needed in the area of economic and fiscal federalism.
>
> We submit that most major Canadian economic and fiscal policies should be by consensus among the majority of the provinces and the federal government. The combined impact of the fiscal policies of a majority of provinces is too substantial to be ignored any longer. No coherent fiscal and economic policy for Canada can be developed if decisions of the 11 governments continue to be uncoordinated. It is improbable that a unanimous agreement would occur, but consensus between the majority provincial view and the federal government would have positive benefits.
>
> This "partnership approach" to fiscal decision-making in Canada would commence with perhaps an annual meeting of First Ministers to discuss and decide on the main thrust of economic policy through the coming year. It would then be up to each individual province and the federal government to decide the specific mix of taxing and spending policies to fit within the general consensus.
>
> This new kind of cooperative federalism would, in our view, enable governments at both levels to make better budgetary decisions for our citizens. It would reflect the interdependence of all parts of Canada and would safeguard the partnership principle of Confederation.

This idea was endorsed by the Premiers at the 1976 Annual Premiers' Conference in Edmonton:

> the Premiers agreed that they should meet annually with the Prime Minister to discuss and plan a national fiscal and economic policy. It was recognized that the combined impact of the fiscal policies of the provinces has a significant impact on the country and its regions. It was emphasized that a co-ordinated approach to meet national economic concerns was essential if the challenges of the future were to be successfully met.

In short, the time has now come to recognize this practice in the Constitution.

IX THE AMENDING FORMULA

Recommendations:

The Alberta Government recommends:

24. **that an amending formula must reflect the principle that all provinces have equal consitutional status; and**
25. **that an amending formula reflect the principle that existing rights, proprietary interests and jurisdiction of a province cannot be diminished without the consent of that province.**

Under Section 91(1) of the **British North America Act,** the Parliament of Canada is authorized to make amendments to the Canadian Constitution, with the following exceptions:

1) classes of subjects assigned exclusively to the legislatures of the provinces;
2) the rights or privileges granted or secured to the legislature or the government of a province;
3) the rights or privileges granted or secured to any class of persons with respect to schools;
4) the use of the English or French language;
5) requirements that there shall be a session of Parliament at least once a year and that no House of Commons shall continue for more than five years.

The provinces, under Section 92(1), have the power to amend their respective constitutions, with the exception of the provisions respecting the Office of the Lieutenant Governor.

Because of the exceptions listed above, a significant number of constitutional provisions cannot be amended by any Canadian legislative authority. Over time, a number of important principles have been developed and can now be regarded as precedents which guide the amendment of the **British North America Act** in these excepted areas. In instances where amendments affect federal-provincial relationships, the practice has emerged that the federal government will first secure the consent of the provinces before proceeding with an amendment. The unanimous consent of the provinces was secured in 1940, with respect to Unemployment Insurance; in 1951, with respect to Old Age Pensions; in 1960, with respect to the retirement age of Supreme Court judges; and in 1964, with respect to supplementary benefits to Old Age Pensions.

This principle of provincial consent was recognized by the Western Premiers at their 1978 Conference in Yorkton, when they stated that:

> Constitutional practice and precedents over the past 111 years clearly establish that the Federal Government must seek and obtain the unanimous consent of all the provinces on proposed constitutional amendments affecting the powers of provincial legislatures.

In 1976, the Government of Alberta expressed its views on constitutional amendment first to the other provincial governments and then to the federal government. In the October 14, 1976 letter from Premier Lougheed to Prime Minister Trudeau, the Alberta position was outlined as follows:

> Alberta held to the view that a constitutional amending formula should not permit an amendment that would take away rights, proprietary interests and jurisdiction from any province without the concurrence of that province. In this regard, Alberta was referring to matters arising under Sections 92, 93 and 109 of the **British North America Act.**

This general position was debated in the Legislative Assembly in November, 1976. On November 4, the following resolution was passed:

> Be it resolved that the Legislative Assembly of Alberta, while supporting the objective of patriation of the Canadian Constitution, re-affirm the fundamental principle of Confederation that all provinces have equal rights within Confederation and hence direct the government that it should not agree to any revised amending formula for the Constitution which could allow any existing rights, proprietary interests or jurisdiction to be taken away from any province without the specific concurrence of that province, and that it should refuse to give its support to any

patriation prior to obtaining the unanimous consent of all provinces for a proper amending formula.

The resolution is based upon two very important principles of federalism:

— that all provinces have equal constitutional status; and

— that, with respect to the rights, proprietary interests and jurisdiction of the provinces, neither the federal government nor any other province can determine any particular province's constitutional status.

Any debate on the amending formula must take into account these very important principles.

Recently, it has been suggested that a possible amending procedure to the Constitution incorporate or make use of referenda. It is the position of the Government of Alberta that amendments to the Constitution are more appropriately secured through legislative action than through the use of referenda. The Government of Alberta does not support the view that, within the Canadian parliamentary system, the use of referenda is appropriate in constitutional matters. The use of referenda undermines the legitimacy of elected legislatures.

X REGIONAL DISPARITIES

Recommendations:

The Alberta Government recommends:

26. **that the objective of reducing regional disparities be recognized in the Constitution; and**
27. **that the principle of equalization be recognized in the Constitution.**

Most Canadians recognize that one of the foremost purposes of Confederation has been to ensure that disparities between the provinces in terms of the well-being of citizens and in terms of the availability of economic, social and cultural opportunities be reduced. The principle of reduction of regional disparities is to strengthen and encourage the less well-developed parts of the country through various programs and policies. However, the development of these policies should not be such as to weaken the development or economic status of the other parts of the country. In the long run, the alleviation of regional disparities must lie in creating new wealth and new strengths in disadvantaged areas.

The Government of Alberta is on record as supporting the principle of equalization through the use of the unconditional transfer of funds to provincial governments. We continue to support this principle. The Alberta Government believes that this is one of the most equitable methods of maintaining the economic well-being of all Canadians. However, in developing its redistributive economic policies through modifications to the tax system, the federal government must ensure that residents of any one province be treated in the same manner as residents of any other province.

XI ENTRENCHMENT OF LANGUAGE RIGHTS

Recommendation:

The Alberta Government recommends:

28. **that the constitution recognize English and French as the official languages of Canada.**

The **British North America Act** does not establish any official languages for Canada. The only substantive provision regarding languages is Section 133, which reads:

> Either the English or the French Language may be used by any Person in the Debates of the House of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.
>
> The Acts of the Parliament of Canada and of the Legislatures of Quebec shall be printed and published in both these Languages.

To a great extent, the principles contained in the **Official Languages Act** of Canada are those which the Alberta Government believes should be recognized in the Constitution, in acknowledgement of the bilingual nature of the Canadian federation.

The ten Premiers have recognized the need to provide education in either language, wherever possible. At the 1977 Annual Premiers' Conference, a resolution on language was agreed to which reads, in part:

> Recognizing our concern for the maintenance and, where indicated, development of minority language rights in Canada; and
>
> Recognizing that education is the foundation on which language and culture rest;
>
> The Premiers agree that they will make their best efforts to provide instruction in education in English and French wherever numbers warrant.

The responsibility for providing minority language education services, however, must remain within provincial jurisdiction. The provision of these services primarily is an educational matter and must be determined by provincial legislatures.

XII ENTRENCHMENT OF OTHER RIGHTS

Recommendation:

The Alberta Government recommends:

29. **that the protection of fundamental human rights continue to be the responsibility of Parliament and the Provincial Legislatures, rather than a bill of rights entrenched in the Constitution.**

The Government of Alberta believes that the rights of Alberta citizens are well protected by the **Alberta Bill of Rights** and the **Alberta Individual's Rights Protection Act.** The primacy clauses of these acts and the upholding of their provisions by the courts has provided the best protection of rights for Albertans.

While there are many proposals for and against entrenchment of human rights in the Constitution, it can be argued that the best guarantee of rights is a vigilant legislature which can take the necessary steps to ensure that the rights of citizens are safeguarded and meet the demands and needs of a changing society. This argument is based upon the concept that the role of legislatures in protecting rights would be significantly diminished if a bill of rights were to be entrenched in the Constitution. The principle of legislative supremacy would be undermined. The courts would become the chief forum for determining what is permissible under an entrenched bill of rights. To a great extent, this has been the case in the United States. One of the consequences has been to involve the courts in the adjudication of a wide range of social questions, which in the interests of society are best debated and resolved in legislatures. Legally enacted bills of rights do not preclude the courts from upholding these rights. The commitment of legislatures to guarantee rights is best secured by incorporating primacy provisions, such as are found in Alberta's legislation.

Further, to entrench rights in the Constitution is to risk the limitation of rights not enumerated therein, to make it very difficult to amend these rights, and to limit the scope of their application.

CONCLUSION

Amending Canada's Constitution is a difficult and challenging task, a process which must be undertaken with great care and deliberation. Proposals for change which will be considered by the participants — the eleven governments — will arise from a number of sources and must be examined carefully. The objective of the exercise is not just to attune Canada's federal system to the needs of today, but to provide a framework for the future.

This paper has introduced a number of concepts and specific recommendations for change. The Government of Alberta believes that these recommendations, if adopted, will help to resolve many of the current problems facing our nation, and will provide a framework within which Canada can continue to evolve with confidence. One of the major premises upon which these concepts and recommendations are based is that strong provinces will be a strengthening and unifying force within Canada. By recognizing the diversity inherent in our federation and by permitting provinces to develop to their full potential, harmony can be achieved and Canada's future assured.

SUMMARY OF RECOMMENDATIONS

In light of the principles affirmed and the concerns enunciated, the Alberta Government recommends:

1. That the proposed changes to the Constitution be considered as a package, and not be compartmentalized.
2. That the process be undertaken with all deliberate speed, but that no unrealistic timetable be established.
3. That no changes to the Constitution which affect federal-provincial relations or which affect the provinces be adopted without the concurrence of the eleven governments of Canada and of Parliament and the Provincial Legislatures.
4. That modifications to the division of powers be recognized as the key to achieving a new federalism for Canada.
5. That the division of powers be discussed concurrently with other constitutional questions, such as federal institutions.
6. That the existing sections in the British North America Act protecting provincial ownership and control of natural resources be strengthened.
7. That the Constitution be clarified in order to re-affirm the provinces' authority to tax and to collect royalties from the sale and management of their natural resources.
8. That provincial jurisdiction be established over offshore minerals.
9. That the province be given access both to direct and indirect taxes, with the exception of customs and import duties.
10. That the Constitution include provisions that confirm the established legitimate role of the provinces in certain areas of international relations.
11. That communications be included as a concurrent power in the Constitution.
12. That sea coast and inland fisheries be a concurrent power in the Constitution, with provincial paramountcy.
13. That provincial jurisdiction over certain aspects of transportation be strengthened by including transportation as a concurrent power.
14. That culture be included in the Constitution as a concurrent power, with provincial paramountcy.
15. That a representative constitutional court be established to resolve constitutional issues.
16. That forty percent of the members of designated national boards and agencies be appointed by the provinces.
17. That the powers of reservation and disallowance be repealed.
18. That the power of the federal government to declare a work situated within a province's borders to be for the general advantage of Canada or for two or more of the provinces should be used only after the concurrence of the province in which the work is situated.
19. That the federal emergency power be limited so as to ensure that the federal government and Parliament cannot assume responsibility over a broad range of matters not listed within the enumerated heads of Section 91.
20. That limits be placed on Parliament's ability to spend in areas of provincial jurisdiction.
21. That the concept of concurrent jurisdiction be expanded through a provision in the Constitution for the delegation of powers between the federal and provincial governments.
22. That before a delegation of powers is effected, the federal government and the province(s) affected concur.
23. That provision be made in the Constitution for an annual meeting of First Ministers.

24. That an amending formula must reflect the principle that all provinces have equal constitutional status.
25. That an amending formula reflect the principle that existing rights, proprietary interests and jurisdiction of a province cannot be diminished without the consent of that province.
26. That the objective of reducing regional disparities be recognized in the Constitution.
27. That the principle of equalization be recognized in the Constitution.
28. That the Constitution recognize English and French as the official languages of Canada.
29. That the protection of fundamental human rights continue to be the responsibility of Parliament and of the Provincial Legislatures, rather than a bill of rights entrenched in the Constitution.

APPENDIX A

PREMIER LOUGHEED TO PRIME MINISTER TRUDEAU, OCTOBER 14, 1976

My dear Prime Minister:

Further to my letter of September 2, 1976 and my telex of October 3, 1976, I wish to inform you of the outcome of the deliberations by the ten Canadian Premiers on the issues raised by you in your letter of March 31, 1976 relative to patriation of the Constitution from Westminster to Canada.

Your letter of March 31, 1976 outlined three possible options and served as a framework for our deliberations. The provinces agreed in May 1976 to proceed with an examination of all three options. You will recall that your option 3 includes patriation, an amending formula and a number of other substantive changes to the British North America Act which were contained in the draft proclamation appended to your letter of March 31, 1976. You will also recall that when the premiers had private discussions on this matter at your residence during the evening of June 14, 1976, you indicated that you would be prepared to accept any proposal which had been unanimously agreed to by the provinces.

At the same time, you indicated that you hoped we could consider the matter over the summer and report to you early in the fall as to the outcome of our deliberations and discussions.

As Chairman of the Annual Conference of Premiers, I would like to now deal with the matters as they were outlined in your letter of March 31, 1976.

Patriation

All provinces agreed with the objective of patriation. They also agreed that patriation should not be undertaken without a consensus being developed on an expansion of the role of the provinces and/or jurisdiction in the following areas: culture, communications, Supreme Court of Canada, spending power, Senate representation and regional disparities. Later in the letter I will endeavour to give you some idea of our discussions on the above matters.

Amending Formula

Considerable time was spent on this important subject and the unanimous agreement of the provinces was not secured on a specific formula. Eight provinces agreed to the amending formula as drafted in Victoria in 1971 and as proposed by you in your draft proclamation. British Columbia wishes to have the Victoria Formula modified to reflect its view that British Columbia should be treated as a distinct entity with its own separate veto. In this sense it would be in the same position as Ontario and Quebec. Alberta held to the view that a constitutional amending formula should not permit an amendment that would take away rights, proprietary interests and jurisdiction from any province without the concurrence of that province. In this regard, Alberta was referring to matters arising under Sections 92, 93 and 109 of the British North America Act.

Matters Unanimously Agreed To

A number of matters were dealt with and unanimously agreed to. Specific texts were considered and given approval, subject to revision by draftsmen.

a) A greater degree of provincial involvement in immigration.
b) A confirmation of the language rights of English and French generally along the lines discussed in Victoria in 1971.
c) A strengthening of jurisdiction of provincial governments of taxation in the areas of primary production from lands, mines, minerals and forests.

d) A provision that the declaratory powers of the federal government to declare a particular work for the general advantage of Canada would only be exercised when the province affected concurred.
e) That a conference composed of the eleven First Ministers of Canada should be held at least once a year as a constitutional requirement.
f) That the creation of new provinces should be subject to any amending formula consensus.

As already mentioned under the remarks on patriation, the provinces were of the view that while patriation was desirable it should be accompanied by the expansion of provincial jurisdiction and involvement in certain areas. The Premiers believed that discussions on these matters should be held with the federal government because they involve the federal government to a significant degree.

a) **Culture** — You will recall that culture was referred to in Parts IV and VI of the draft proclamation. The interprovincial discussions on culture focused on the addition of a new concurrent power to be included in the Constitution. This power would refer to arts, literature and cultural heritage and would be subject to provincial paramountcy. On this matter, there was a high degree of consensus on the principle and considerable progress was made with respect to a solution. There was also, however, firm opinion from one province that the provinces and the federal government should have concurrent jurisdictional powers in the area.

b) **Communications** — In the draft proclamation, communications was referred to in Part VI. Discussions on this subject related to a greater provincial control in communications, particularly in the area of cable television.

c) **Supreme Court of Canada** — In general, discussions on this topic developed from those articles found in Part II of the draft proclamation. The provinces unanimously agreed to a greater role for the provinces in the appointment of Supreme Court judges than provided for in the draft proclamation. In addition, a number of other modifications were suggested to the provisions found in the draft proclamation.

d) **Spending Power** — Discussion on this matter focused on the necessity and desirablity of having a consensus mechanism which must be applied before the federal government could exercise its spending power in areas of provincial jurisdiction.

e) **Senate Representation** — Discussion on this subject related to British Columbia's proposal that Senate representation for that province be increased.

f) **Regional Disparities and Equalization** — In the draft proclamation, Regional Disparities was referred to in Part V. The discussions on this topic focused on the expansion and strengthening of this section to include a reference to equalization. There was unanimous agreement on the clause contained in the draft proclamation and a high degree of consensus on incorporating clauses in the Constitution providing for equalization.

Other matters were discussed, but it was felt by the Premiers that their deliberations had been of a preliminary and exploratory nature. As such, in any future meeting it is possible that individual

provinces may present additional suggestions for consideration.

The Premiers were of the view that significant progress on this complex matter had occurred. It was felt that further progress would require discussions between the provinces and the federal government. It was concluded by the Premiers that the next step should be for you to meet with the Premiers and develop the discussions reflected in this letter. The Premiers felt that it would now be appropriate for them to accept your invitation for further discussions in the near future, at a mutually agreeable time.

Given the importance of this subject and the reference to it in your Throne Speech of October 12, 1976, the other Premiers may wish to join with me in tabling this letter before our respective provincial legislatures or otherwise making this letter public on October 20, 1976. If you have any objection could you please advise me forthwith.

Signed
Peter Lougheed

APPENDIX B

COMMUNIQUE ON CONSTITUTIONAL REFORM:
THE POSITION OF THE PROVINCES
REGINA PREMIERS' CONFERENCE, AUGUST 9-12, 1978

I. THE PROCESS OF CONSTITUTIONAL REFORM

For many years, provincial governments have shown concern over constitutional issues and have participated actively in a large number of conferences and discussions. As a result of provincial initiatives and leadership, a great deal of useful progress has been made in identifying problems requiring constitutional action, and achieving a greater understanding of their implications.

Premiers agreed that the division of powers is the key issue in constitutional reform, and should be addressed in conjunction with other matters.

1. **The Importance of Constitutional Discussions**

The provinces endorse the need for constitutional reform, to provide the basis for all Canadians to achieve a greater measure of economic and social well-being and cultural fulfillment, and to establish more harmonious relations among governments.

2. **First Ministers' Conference on the Constitution**

The provincial governments therefore look forward to the forthcoming First Ministers' Conference on the Constitution now scheduled for the end of October.

They believe that the Conference should be open.

They believe, further, that the agenda must accommodate all proposals, and should be drawn up jointly by the federal government and the provinces.

The Premiers accordingly have instructed Ministers responsible for the Constitution to continue preparatory work, and to invite the federal Minister of State for Federal-Provincial Relations to meet with them.

3. **Proposals**

In the view of the Premiers, important proposals from all sources must be given careful and thorough consideration in the constitutional review process. Some of these proposals are:

— the consensus reached by the ten provincial Premiers in October, 1976.
— proposals made, or under preparation, by or for federal or provincial governments, such as the report expected from the Task Force on Canadian Unity, co-chaired by Hon. Jean-Luc Pepin and Hon. John Roberts.
— the federal government's Constitutional Amendment Bill.

4. **The Importance of Agreement**

The Premiers firmly believe that significant constitutional reform should have the concurrence of all governments, recognizing the equality of status of all provinces in the process.

It is doubtful whether the federal government has the legal authority to proceed unilaterally with proposed changes to the Senate and the role of the monarchy. In any event, it would clearly be wrong for them to undertake unilateral action in those or other important areas without provincial support.

Constitutional reform must be part of a process that will improve the well-being of all citizens and strengthen intergovernmental relations.

5. **A Comprehensive Approach**

It was agreed that discussions on constitutional reform cannot be compartmentalized into artificial divisions. Institutional and jurisdictional problems interact in such a way that they must be considered together.

The Premiers agreed that problems involving the distribution of power between the federal government and the provinces have been a major source of friction and have a negative impact on the daily lives of all Canadians. These problems demand equal attention.

6. **A Realistic Timeframe**

A comprehensive review is unlikely to be successful if arbitrary deadlines are imposed. A fixed and rigid timetable is unrealistic and does nothing to contribute to the harmony and goodwill necessary to complete a process of constitutional review.

II. THE SUBSTANCE OF CONSTITUTIONAL REFORM

1. The Consensus Reached by Premiers in 1976

Provinces agreed to advance, again, the 1976 consensus, which has not received an adequate response from the federal government. That consensus constitutes a useful starting point for discussions with the federal government in crucial areas involving the distribution of powers, and represents a positive contribution toward the resolution of significant problems.

Quebec said that, while committed to its option of sovereignty-association, it could generally go along with the 1976 consensus and most of the other constitutional points raised in Regina. Quebec went on to state that this approach falls within the mandate of the Quebec government to reinforce provincial rights, within the present system, and also illustrates some of the minimal changes required to make the federal system a serious alternative in the forthcoming Quebec referendum.

The 1976 consensus covered a number of areas of concern:

— immigration
— language rights
— resource taxation
— the federal declaratory power
— annual Conference of First Ministers
— creation of new provinces
— culture
— communications
— Supreme Court of Canada
— the federal spending power
— regional disparities and equalization.

2. Other Areas of Consensus

In addition, the Premiers, in the course of their discussion in Regina, have reached agreement on a number of additional substantive matters, on which federal views are invited:

— abolition of the now obsolete federal powers to reserve or disallow provincial legislation
— a clear limitation on the federal power to implement treaties, so that it cannot be used to invade areas of provincial jurisdiction
— the establishment of an appropriate provincial jurisdiction with respect to fisheries
— confirmation and strengthening of provincial powers with respect to natural resources
— full and formal consultation with the provinces in appointments to the Superior, District and County Courts of the provinces
— appropriate provincial involvement in appointments to the Supreme Court of Canada.

3. Other Subjects

Further, there was a consensus that a number of additional matters require early consideration:

— the federal emergency power
— formal access of the provinces to the field of indirect taxation
— the federal residual power
— amending formula and patriation
— the delegation of legislative powers between governments.

4. Elements of the Constitutional Amendment Bill

With regard to the federal Constitutional Amendment Bill, Premiers expressed a number of substantive concerns, in addition to the points noted previously.

Provinces agree that the system of democratic parliamentary government requires an ultimate authority to ensure its responsible nature and to safeguard against abuses of power. That ultimate power must not be an instrument of the federal Cabinet. The Premiers, therefore, oppose constitutional changes that substitute for the Queen as ultimate authority, a Governor General whose appointment and dismissal would be solely at the pleasure of the federal Cabinet.

The provinces regard the House of the Federation, as proposed, as unworkable.

Some provinces support the principle of constitutional entrenchment of basic rights; while others believe that, under our parliamentary system, individual rights are better protected by basic constitutional traditions and the ordinary legislative process.

Provinces are concerned over section 8 of the federal Bill and its potential interference with important provincial legislation respecting land ownership and other matters.

Some Premiers noted that the proposed language guarantees go substantially beyond earlier proposals, and feel that practical difficulties may be encountered in their provinces, particularly in respect of provincial government services and courts.

All Premiers expressed grave concern that section 109 of the B.N.A. Act, concerning provincial ownership of natural resources, has not been carried forward into the proposed new constitution.

Premiers are concerned that section 32 of the Constitutional Amendment Bill is an attempt by the federal government to acquire from the provinces jurisdiction over offshore territories and resources.

Premiers feel that, if there is to be a preamble, it should be short, clear, and precise. A statement of aims, if any, would best be included in the preamble.

Premiers stressed that all these issues, and others, will require careful and detailed discussion with the federal government.

VI.—DISTRIBUTION OF LEGISLATIVE POWERS

Powers of the Parliament.

91. It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater Certainty, but not so as to restrict the Generality of the foregoing Terms of this Section, it is hereby declared that (notwithstanding anything in this Act) the exclusive Legislative Authority of the Parliament of Canada extends to all Matters coming within the Classes of Subjects next herein-after enumerated; that is to say,—

Legislative Authority of Parliament of Canada.

1. The amendment from time to time of the Constitution of Canada, except as regards matters coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the provinces, or as regards rights or privileges by this or any other Constitutional Act granted or secured to the Legislature or Government of a province, or to any class of persons with respect to schools or as regards the use of English or the French language or as regards the requirements that there shall be a session of the Parliament of Canada at least once each year, and that no House of Commons shall continue for more than five years from the day of return of the Writs for choosing the House: provided, however, that a House of Commons may in time of real or apprehended war, invasion or insurrection be continued by the Parliament of Canada if such continuation is not opposed by the votes of more than one-third of the members of such House. (39)

1A. The Public Debt and Property. (40)

2. The Regulation of Trade and Commerce.

2A. Unemployment insurance. (41)

3. The raising of Money by any Mode or System of Taxation.

4. The borrowing of Money on the Public Credit.

5. Postal Service.

6. The Census and Statistics.

7. Militia, Military and Naval Service, and Defence.

8. The fixing of and providing for the Salaries and Allowances of Civil and other Officers of the Government of Canada.

9. Beacons, Buoys, Lighthouses, and Sable Island.

10. Navigation and Shipping.

11. Quarantine and the Establishment and Maintenance of Marine Hospitals.

12. Sea Coast and Inland Fisheries.

13. Ferries between a Province and any British or Foreign Country or between Two Provinces.

14. Currency and Coinage.

15. Banking, Incorporation of Banks, and the Issue of Paper Money.

16. Savings Banks.

17. Weights and Measures.

18. Bills of Exchange and Promissory Notes.

19. Interest.

20. Legal Tender.

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(39) Added by the *British North America (No. 2) Act, 1949,* 13 Geo. VI, c. 81 (U.K.).

(40) Re-numbered by the *British North America (No. 2) Act, 1949.*

(41) Added by the *British North America Act, 1940,* 3-4 Geo. VI. c. 36 (U.K.).

21. Bankruptcy and Insolvency.
22. Patents of Invention and Discovery.
23. Copyrights.
24. Indians, and Lands reserved for the Indians.
25. Naturalization and Aliens.
26. Marriage and Divorce.
27. The Criminal Law, except the Constitution of Courts of Criminal Jurisdiction, but including the Procedure in Criminal Matters.
28. The Establishment, Maintenance, and Management of Penitentiaries.
29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

And any Matter coming within any of the Classes of Subjects enumerated in this Section shall not be deemed to come within the Class of Matters of a local or private Nature comprised in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces. (42)

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(42) Legislative authority has been conferred on Parliament by other Acts as follows:

1. The *British North America Act, 1871,* 34-35 Vict., c. 28 (U.K.).

2. The Parliament of Canada, may from time to time establish new Provinces in any territories forming for the time being part of the Dominion of Canada, but not included in any Province thereof, and may, at the time of such establishment, make provision for the constitution and administration of any such Province, and for the passing of laws for the peace, order, and good government of such Province, and for its representation in the said Parliament.

3. The Parliament of Canada may from time to time, with the consent of the Legislature of any Province of the said Dominion, increase, diminish, or otherwise alter the limits of such Province, upon such terms and conditions as may be agreed to by the said Legislature, and may, with the like consent, make provision respecting the effect and operation of any such increase or diminution or alteration of territory in relation to any Province affected thereby.

4. The Parliament of Canada may from time to time make provision for the administration peace, order, and good government of any territory not for the time being included in any Province.

5. The following Acts passed by the said Parliament of Canada, and intituled respectively,— "An Act for the temporary government of Rupert's Land and the North Western Territory when united with Canada"; and "An Act to amend and continue the Act thirty-two and thirty-three Victoria, chapter three, and to establish and provide for the government of "the Province of Manitoba," shall be and be deemed to have been valid and effectual for all purposes whatsoever from the date at which they respectively received the assent, in the Queen's name, of the Governor General of the said Dominion of Canada.

6. Except as provided by the third section of this Act, it shall not be competent for the Parliament of Canada to alter the provisions of the last-mentioned Act of the said Parliament in so far as it relates to the Province of Manitoba, or of any other Act hereafter establishing new Provinces in the said Dominion, subject always to the right of the Legislature of the Province of Manitoba to alter from time to time the provisions of any law respecting the qualification of electors and members of the Legislative Assembly, and to make laws respecting elections in the said Province.

The *Rupert's Land Act 1868,* 31-32 Vict., c. 105 (U.K.) (repealed by the *Statute Law Revision Act, 1893,* 56-57 Vict., c. 14 (U.K.)) had previously conferred similar authority in relation to Rupert's Land and the North-Western Territory upon admission of those areas.

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Exclusive Powers of Provincial Legislatures.

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subject next herein-after enumerated; that is to say,— Subjects of exclusive Provincial Legislation

1. The Amendment from Time to Time, notwithstanding anything in this Act, of the Constitution of the Province, except as regards the Office of Lieutenant Governor.
2. Direct Taxation within the Province in order to the raising of a Revenue for Provincial Purposes.
3. The borrowing of Money on the sole Credit of the Province.
4. The Establishment and Tenure of Provincial Offices and the Appointment and Payment of Provincial Officers.
5. The Management and Sale of the Public Lands belonging to the Province and of the Timber and Wood thereon.
6. The Establishment, Maintenance, and Management of Public and Reformatory Prisons in and for the Province.
7. The Establishment, Maintenance, and Management of Hospitals, Asylums, Charities, and Eleemosynary Institutions in and for the Province, other than Marine Hospitals.
8. Municipal Institutions in the Province.
9. Shop, Saloon, Tavern, Auctioneer, and other Licences in order to the raising of a Revenue for Provincial, Local, or Municipal Purposes.
10. Local Works and Undertakings other than such as are of the following Classes:—
    (a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Understandings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province;
    (b) Lines of Steam Ships between the Province and any British or Foreign Country;
    (c) Such Works as, although wholly situate within the Province, are before or after their Execution declared by the Parliament of Canada to be for the general Advantage of Canada or for the Advantage of Two or more of the Provinces.
11. The Incorporation of Companies with Provincial Objects.
12. The Solemnization of Marriage in the Province.
13. Property and Civil Rights in the Province.
14. The Administration of Justice in the Province, including the Constitution, Maintenance, and Organization of Provincial Courts, both of Civil and of Criminal Jurisdiction, and including Procedure in Civil Matters in those Courts.
15. The Imposition of Punishment by Fine, Penalty, or Imprisonment for enforcing any Law of the Province made in relation to any Matter coming within any of the Classes of Subjects enumerated in this Section.
16. Generally all Matters or a merely local or private Nature in the Province.

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2. The *British North America Act, 1886,* 49-50 Vict., c. 35, (U.K.)

   1. The Parliament of Canada may from time to time make provision for the representation in the Senate and House of Commons of Canada, or in either of them, of any territories which for the time being form part of the Dominion of Canada, but are not included in any province thereof.

3. The *Statute of Westminster, 1931,* 22 Geo. V, c. 4, (U.K.).

   3. It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

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Education.

Legislation respecting Education.

93. In and for each Province the Legislature may exclusively make Laws in relation to Education, subject and according to the following Provision:—

(1) Nothing in any such Law shall prejudicially affect any Right or Privilege with respect to Denominational Schools which any Class of Persons have by Law in the Province at the Union:

(2) All the Powers, Privileges, and Duties at the Union by Law conferred and imposed in Upper Canada on the Separate Schools and School Trustees of the Queen's Roman Catholic Subjects shall be and the same are hereby extended to the Dissentient Schools of the Queen's Protestant and Roman Catholic Subjects in Quebec:

(3) Where in any Province a System of Separate or Dissentient Schools exists by Law at the Union or is thereafter established by the Legislature of the Province, an Appeal shall lie to the Governor General in Council from any Act or Decision of any Provincial Authority affecting any Right or Privilege of the Protestant or Roman Catholic Minority of the Queen's Subjects in relation to Education:

(4) In case any such Provincial Law as from Time to Time seems to the Governor General in Council requisite for the due Execution of the Provisions of this Section is not made, or in case any Decision of the Governor General in Council on any Appeal under this Section is not duly executed by the proper Provincial Authority in that Behalf, then and in every such Case, and as far only as the Circumstances of each Case require, the Parliament of Canada may make remedial Laws for the due Execution of the Provisions of this Section and of any Decision of the Governor General in Council under this Section. (43)

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(43) Altered for Manitoba by section 22 of the *Manitoba Act,* 33 Vict., c. 3 (Canada), (confirmed by the *British North America Act, 1871*), which reads as follows:

22. In and for the Province, the said Legislature may exclusively make Laws in relation to Education, subject and according to the following provisions:—

(1) Nothing in any such Law shall prejudicially affect any right or privilege with respect to Denominational Schools which any class of persons have by Law or practice in the Province at the Union:

(2) An appeal shall lie to the Governor General in Council from any Act or decision of the Legislature of the Province, or of any Provincial Authority, affecting any right or privilege, of the Protestant or Roman Catholic minority of the Queen's subjects in relation to Education:

(3) In case any such Provincial Law, as from time to time seems to the Governor General in Council requisite for the due execution of the provisions of this section, is not made, or in case any decision of the Governor General in Council on any appeal under this section is not duly executed by the proper Provincial Authority in that behalf, then, and in every such case, and as far only as the circumstances of each case require, the Parliament of Canada may make remedial Laws for the due execution of the provisions of this section, and of any decision of the Governor General in Council under this section.

Altered for Alberta by section 17 of *The Alberta Act,* 4-5 Edw. VII, c. 3 which reads as follows:

17. Section 93 of The British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93 of the following paragraph:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

Old Age Pensions.

94A. The Parliament of Canada may make laws in relation to old age pensions and supplementary benefits, including survivors' and disability benefits irrespective of age, but no such law shall affect the operation of any law present or future of a provincial legislature in relation to any such matter. (44)

Legislation respecting old age pensions and supplementary benefits.

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2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29 or any Act passed in amendment thereof, or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph 3 of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30, and where the expression "at the Union" is employed, in the said paragraph 3, it shall be held to mean the date at which this Act comes into force.

Altered for Saskatchewan by section 17 of *The Saskatchewan Act,* 4-5 Edw. VII, c. 42, which reads as follows:

17. Section 93 of the British North America Act, 1867, shall apply to the said province, with the substitution for paragraph (1) of the said section 93, of the following paragraph:—

(1) Nothing in any such law shall prejudicially affect any right or privilege with respect to separate schools which any class of persons have at the date of the passing of this Act, under the terms of chapters 29 and 30 of the Ordinances of the Northwest Territories, passed in the year 1901, or with respect to religious instruction in any public or separate school as provided for in the said ordinances.

2. In the appropriation by the Legislature or distribution by the Government of the province of any moneys for the support of schools organized and carried on in accordance with the said chapter 29, or any Act passed in amendment thereof or in substitution therefor, there shall be no discrimination against schools of any class described in the said chapter 29.

3. Where the expression "by law" is employed in paragraph (3) of the said section 93, it shall be held to mean the law as set out in the said chapters 29 and 30; and where the expression "at the Union" is employed in the said paragraph (3), it shall be held to mean the date at which this Act comes into force.

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(44) Added by the *British North America Act, 1964,* 12-13, Eliz. II, c. 73 (U.K.). Originally enacted by the *British North America Act, 1951,* 14-15 Geo. VI, c. 32 (U.K.), as follows:

94A. It is hereby declared that the Parliament of Canada may from time to time make laws in relation to old age pensions in Canada, but no law made by the Parliament of Canada in relation to old age pensions shall affect the operation of any law present or future of a Provincial Legislature in relation to old age pensions.

Concurrent Powers of Legislation respecting Agriculture, etc.

95. In each Province the Legislature may make Laws in relation to Agriculture in the Province, and to Immigration into the Province; and it is hereby declared that the Parliament of Canada may from Time to Time make Laws in relation to Agriculture in all or any of the Provinces, and to Immigration into all or any of the Provinces; and any Law of the Legislature of a Province relative to Agriculture or to Immigration shall have effect in and for the Province as long and as far only as it is not repugnant to any Act of the Parliament of Canada.

Property in Lands, Mines, etc.

109. All Lands, Mines, Minerals and Royalties belonging to the several Provinces of Canada, Nova Scotia, and New Brunswick at the Union, and all Sums then due or payable for such Lands, Mines, Minerals, or Royalties, shall belong to the several Provinces of Ontario, Quebec, Nova Scotia, and New Brunswick in which the same are situate or arise, subject to any Trusts existing in respect thereof, and to any Interest other than that of the Province in the same. (48)

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(48) The four western provinces were placed in the same position as the original provinces by the *British North America Act, 1930,* 21 Geo. V, c. 26 (U.K.).

Provincial Public Property.

117. The several Provinces shall retain all their respective Public Property not otherwise disposed of in this Act, subject to the Right of Canada to assume any Lands or Public Property required for Fortifications or for the Defence of the Country.

Use of English and French Languages.

133. Either the English or the French Language may be used by any Person in the Debates of the Houses of the Parliament of Canada and of the Houses of the Legislature of Quebec; and both those Languages shall be used in the respective Records and Journals of those Houses; and either of those Languages may be used by any Person or in any Pleading or Process in or issuing from any Court of Canada established under this Act, and in or from all or any of the Courts of Quebec.

The Acts of the Parliament of Canada and of the Legislature of Quebec shall be printed and published in both those Languages.

No. 25

THE BRITISH NORTH AMERICA ACT, 1930

20-21 George V, c. 26 (U.K.)

An Act to confirm and give effect to certain agreements entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba, British Columbia, Alberta and Saskatchewan respectively.

(10th July 1930)

Whereas the agreements set out in the Schedule to this Act were entered into between the Government of the Dominion of Canada and the Governments of the Provinces of Manitoba, British Columbia, Alberta and Saskatchewan respectively subject, however, in each case to approval by the Parliament of Canada and the Legislature of the Province to which the agreement relates and also to confirmation by the Parliament of the United Kingdom:

And whereas each of the said agreements has been duly approved by the Parliament of Canada and by the Legislature of the Province to which it relates:

And whereas, after the execution of the said agreement relating to the Province of Alberta, it was agreed between the parties concerned, subject to such approval and confirmation as aforesaid, that the said Province should, in addition to the rights accruing to it under the said agreement as originally executed, be entitled to such further rights, if any, with respect to the subject matter of the said agreement as were required to be vested in the Province in order that it might enjoy rights equal to those which might be conferred upon or reserved to the Province of Saskatchewan under any agreement upon a like subject matter thereafter approved and confirmed in the manner aforesaid, and provision in that behalf was accordingly made by the Parliament of Canada and the Legislature of the Province of Alberta when approving the said agreement:

And whereas the Senate and Commons of Canada in Parliament assembled have submitted an address to His Majesty praying that His Majesty may graciously be pleased to give his consent to the submission of a measure to the Parliament of the United Kingdom for the confirmation of the said agreements:

Be it therefore enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Confirmation of scheduled agreements. 30 & 31 Vict. c. 3

1. The agreements set out in the Schedule to this Act are hereby confirmed and shall have the force of law notwithstanding anything in the British North America Act, 1867, or any Act amending the same, or any Act of the Parliament of Canada, or in any Order in Council or terms or conditions of union made or approved under any such Act as aforesaid.

Extension of scheduled agreement relating to Alberta.

2. The agreement relating to the Province of Alberta which is confirmed by this Act shall be construed and have effect for all purposes as if it contained a provision to the following effect, namely, that the said Province shall, in addition to the rights accruing to it under the said agreement as originally executed, be entitled to such further rights, if any, with respect to the subject matter of the said agreement as are required to be vested in the Province in order that it may enjoy rights equal to those conferred upon, or reserved to, the Province of Saskatchewan under the agreement relating to that Province which is confirmed by this Act.

Short title.

3. This Act may be cited as the British North America Act, 1930, and the British North America Acts, 1867 to 1916, and this Act may be cited together as the British North America Acts, 1867 to 1930.

EXCERPT OF AGREEMENT BETWEEN ALBERTA AND CANADA, PURSUANT TO THE **BRITISH NORTH AMERICA ACT,** 1930

1. In order that the Province may be in the same position as the original Provinces of Confederation are in virtue of section one hundred and nine of the *British North America Act, 1867,* the interest of the Crown in all Crown lands, mines, minerals (precious and base) and royalties derived therefrom within the Province, and all sums due and payable for such lands, mines, minerals or royalties, shall, from and after the coming into force of this agreement and subject as therein otherwise provided, belong to the Province, subject to any trusts existing in respect thereof, and to any interest other than that of the Crown in the same, and the said lands, mines, minerals or royalties shall be administered by the Province for the purposes thereof, subject, until the Legislature of the Province otherwise provides, to the provisions of any Act of Parliament of Canada relating to such administration; any payment received by Canada in respect of any such lands, mines, minerals or royalties before the coming into force of this agreement shall continue to belong to Canada whether paid in advance or otherwise, it being the intention that, except as herein otherwise specially provided, Canada shall not be liable to account to the Province for any payment made in respect of any of the said lands, mines, minerals or royalties before the coming into force of this agreement, and that the Province shall not be liable to account to Canada for any such payment made thereafter.